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No. 04-1381

IN THE
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,
Petitioners,

v.

WAYNE SMITH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents two distinct but related questions of fundamental importance to the fair and practical resolution of complex nationwide litigation: (1) May a class be certified for settlement if an equivalent class could not be certified for litigation? (2) Can the named representatives of a settlement class satisfy the "adequacy" requirement of Federal Rule of Civil Procedure 23(a) when the class includes members of competing litigation subclasses? In a decision that conflicts with decisions of this Court and two other Circuits, a divided Seventh Circuit panel answered "no" to both questions.

Respondent Chem-Tronics, Inc. ("Chem-Tronics") does not directly deny the decisional conflicts created by the majority's opinion below. Chem-Tronics rests its opposition to certiorari on two other grounds. *First*, Chem-Tronics insists that the decision below is "fact-driven" rather than "doctrinal" and thus not worthy of review. Br. Opp. 3-4. *Second*, Chem-Tronics labors to minimize the significance of the dispute by describing it as a mere "handful of state and federal class actions" with no implications for the physical structure of the nation's telecommunications grid. Br. Opp. 1.

These contentions are far off base. The Seventh Circuit's rejection of the class certification order was *not* driven by any facts unique to this case, but by two related *legal* principles that would preclude the certification of settlement classes in virtually *any* case of nationwide scope and complexity. It is thus critically important to the successful resolution of complex civil litigation in this country to determine whether those legal principles have merit – just as it is vital to the efficient operation of the nation's telecommunications grid to determine whether the class certification and settlement in this case is sustainable. Certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW RESTS ON LEGAL PRINCIPLES AT ODDS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

Chem-Tronics' chief objection to review is that the decision below is a "fact-driven" ruling that implicates no legal issues of any consequence. Br. Opp. 3. To be sure, one of the courts below did reach a "fact-driven" result based on the record. But that court was the *district court* – not the Seventh Circuit. The latter plainly reached its result based on two related *legal* principles that it believed flowed ineluctably from this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In so holding, the Seventh Circuit placed itself in direct conflict with the decisions of the Third and Tenth Circuits, both of which have explicitly rejected the argument that *Amchem* precludes certification of settlement classes under circumstances materially identical to those presented here.

1. According to Chem-Tronics, the decision below is unworthy of review because it turns on "fact-intensive discretionary rulings" that the settling plaintiffs and their counsel were "hapless negotiating partners"; that neither could "be counted upon to honestly fulfill fiduciary obligations to the class"; and that their "[i]nept and unsuccessful efforts to conduct class proceedings" rendered their representation inadequate. Br. Opp. 3-4.

But such findings are nowhere to be found in the majority decision. The only court that made *any* findings as to the quality, competency, and honesty of the settling plaintiffs and their counsel was the district court, which *specifically* rejected Chem-Tronics' depiction of the settlement's negotiating history. After lengthy review of that history, the district court found that "[t]he Plaintiffs, represented by counsel experienced in complex litigation, will fairly and adequately protect the interests of the Class." Pet. App. 13a. In particu-

lar, the district court affirmed the factual findings of the magistrate judge that "the Plaintiffs' Counsel have also been engaged in genuine litigation efforts against the Settling Defendants" and that there was no "basis for concluding that the Settling Defendants chose to negotiate with the Plaintiffs' Counsel because the Settling Defendants believed that the Plaintiffs' Counsel could not or would not effectively represent the class" – in short, that this case was "not remotely like" the collusive bargaining situation portrayed by Chem-Tronics. Pet. App. 25a.

The Seventh Circuit's decision fails even to *mention*, let alone reject, any of those factual findings as to the adequacy of the settling plaintiffs as class representatives. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 n.20 (1982) ("If the Court of Appeals disagreed with the District Court's factual findings, it should not have dismissed them without finding them clearly erroneous."). Indeed, the only substantive discussion of the district court's findings is found in Judge Cudahy's *dissenting* opinion, which contrasts the district court's careful Rule 23 findings with the majority's categorical rejection of the settlement class certification order. Pet. App. 7a-8a (Cudahy, J., dissenting).

Far from being "fact-intensive" (Br. Opp. 4), the majority's opinion reflects a broad legal judgment about settlement class certification, which rests on just two general "facts" that are simply commonplace realities of complex litigation. First, Kansas and Tennessee landowner groups had already been certified as statewide litigation classes with the theoretical potential for monetary recoveries greater than they would receive in the nationwide settlement. Pet. App. 4a. Second, a similar nationwide litigation class had been rejected in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), and thus the settling plaintiffs "entered negotiations in what the *Amchem* court describes as a 'disarmed' state." Pet App. 4a. That is the sum total of the Seventh Circuit's ade-

quacy analysis – nothing more. Pet. App. 8a (Cudahy, J., dissenting) (majority opinion rests on "one-paragraph disparagement of a related class action in *Isaacs*"). From those two general "facts" – both of which will be present in virtually any complex litigation nationwide in scope – the majority's opinion leaps to the conclusion that a nationwide settlement class cannot be certified as a matter of law, *despite* the district court's unrefuted factual findings as to the adequacy of the settling plaintiffs as class representatives.[1]

2. It is that categorical legal conclusion that gives rise to

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[1] In an attempt to defend the Seventh Circuit's decision on factual grounds irrelevant to the majority's actual opinion, Chem-Tronics falsely states that "the record below was that the settling plaintiffs had abandoned the prosecution of most of their cases at an early date." Br. Opp. 2. The record below showed no such thing, as the district court recognized in finding the Heins group plaintiffs to be adequate representatives. In fact, at the time the Heins group plaintiffs began negotiations with defendants in the fall 2000, they had numerous advanced cases pending against all petitioners and were clearly the most "well armed" plaintiffs' group. Chem-Tronics, by contrast, had only one case pending against one petitioner, and a class was not certified in that case until *after* the Heins group began negotiations. (Chem-Tronics' counsel had one other case pending against one other defendant, and class certification in that case had been denied. *Hallaba v. Worldcom Networks Servs., Inc.*, 196 F.R.D. 630 (N.D. Ok. 2000)). Development of the Heins cases was stayed when a settlement was reached in 2001, but at no point did the Heins group plaintiffs abandon prosecution of their cases.

Chem-Tronics also misleadingly states that the settling plaintiffs "were rejected as class representatives on the rare instances when the issue was broached." Br. Opp. 2. The cited opinion, *Chambers v. Sprint Corp.*, 2002 U.S. Dist. LEXIS 22621 (W.D. Wis. March 2, 2002), says nothing at all about the issue; the companion opinion that is actually relevant discusses adequacy only in the context of rejecting a *litigation* class on grounds – primarily the individualized nature of the claims – that are not necessarily applicable in the settlement-class context, for all the reasons we have elaborated. *See* Opinion and Order, March 2, 2001, at 20-21, *Chambers v. MCI WorldCom Network Servs., Inc.*, No. 00-C-348-C (W.D. Wis.). The opinion in no way suggests that the named plaintiffs were anything other than vigorous adversaries of the petitioners.

the questions presented here. Beyond its mischaracterization of the decision below as "fact-driven," Chem-Tronics has almost nothing to say in opposing review of those questions.

a. The first question is whether the Seventh Circuit erred in holding that a settlement class cannot be certified where, as here, an equivalent litigation class could not be certified. Pet. 13-15. As to this question, Chem-Tronics merely adverts to the fact that one of the petitioners opposed certification of the litigation class in *Isaacs*. Br. Opp. 2, 3. This badly misses the point: *Isaacs*' rejection of a *litigation* class merely raises the question whether a *settlement* class still could be certified, it does not answer that question. Pet. 13-14. Other than its reference to *Isaacs*, Chem-Tronics simply ignores the first question presented – and thereby ignores this Court's holding in *Amchem* that some classes that could *not* be certified for litigation purposes *may* be certified for settlement purposes, 521 U.S. at 620,[2] and the decisions of the Third and Tenth Circuits affirming settlement class certification orders where, as here, an equivalent litigation class could not be certified. Pet. 14-15 (discussing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002)). The conflict between those decisions and the decision below should be resolved.

b. The second question presented is whether the named plaintiffs in a settlement class may be deemed conclusively inadequate representatives of the class merely because the class includes competing litigation sub-classes, even absent a finding of collusion or conflict. Pet. 15-25. Chem-Tronics' only response on this point is to attack what it describes as "scoundrelly" and "carnival-like" behavior by settling plaintiffs. Br. Opp. 3, 5. As *both* opinions below demonstrate,

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[2] Indeed, the concerns identified in *Isaacs* related principally to the manageability of litigating the case as a class action, and not to the adequacy of the representatives. *See Isaacs*, 261 F.3d at 682.

these insults are directed at a straw man.

Chem-Tronics' invective centers on an unsuccessful attempt to submit a proposed settlement in a case before the district court in Oregon. Pet. App. 2a-3a. What Chem-Tronics ignores is that the Oregon court refused to entertain the settlement explicitly out of deference to the Illinois district court, given the work and resources the latter court had already invested to address "objections raised by the intervenors" and to establish "a fair process to analyze the proposed settlement." *Zografos v. Qwest Communications Corp.*, 225 F. Supp. 2d 1217, 1222 (D. Or. 2002). Following the subsequent submission of the settlement to the Illinois district court,[3] that court engaged in lengthy and detailed scrutiny of both the terms of the settlement and the nature of the negotiations – just as the Oregon court had anticipated in declining to exercise its own jurisdiction. And after careful consideration of the various objections and grievances of Chem-Tronics and other intervenors, the Illinois district court rejected them all. The district court thus recognized, in other words, that the Oregon submission was simply irrelevant to the questions ultimately before it: were the requirements of Rule 23 satisfied given the settlement, and was the settlement fair? And although the court of appeals' majority described the history of the case as "troubled," Pet. App. 2a, it too apparently understood that the Oregon submission was irrelevant to proper analysis of those dispositive questions: the majority's *legal* discussion of the merits of the class certification order *completely ignores the Oregon filings*. Pet. App. 4a-5a.

Again, it is that legal discussion that comes before this Court – Chem-Tronics' consistently rejected allegations of

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[3] Contrary to the implication in both Chem-Tronics' opposition and the decision below, the parties did *not* move for preliminary approval of the proposed settlement in the Illinois district court before moving in the pending Oregon case.

collusion and conspiracy are a diversionary sideshow. But Chem-Tronics' brief does unwittingly illustrate a systemic problem created by the decision below. As Chem-Tronics all but admits (Br. Opp. 3), Chem-Tronics would object to *any* settlement of this complex dispute on terms not dictated by Chem-Tronics itself. As a practical matter, this dynamic will exist in almost all disputes of nationwide scope: *somebody* will resist settlement on all but the most one-sided terms. The purpose of Rule 23(e) is to establish a process by which the district court can hear such objections, and then ultimately rule as to whether the settlement, despite necessary compromises, is fair overall to the entire class. As this case demonstrates, however, Rule 23(e) fairness objectors can also frame their challenges as Rule 23(a) "adequacy" objections – "the settling plaintiff is not doing things my way, so he is not adequately representing my interests." For good reason, Rule 23(a) has never been understood this way; this Court and others have made clear that the "adequacy" inquiry turns on whether the interests of the named plaintiffs are aligned with those of the class members or whether there is actual collusion between the named plaintiffs and the defendants. Pet. 16-19, 23-24.

The decision below supplants that inquiry with a conclusive presumption that settling plaintiffs are not "adequate" representatives of class members already in pending litigation subclasses – even absent objectively conflicting interests, and even absent collusion with the defendants. Not only does that holding conflict with the general rule, it conflicts with the *specific* holdings of the Third and Tenth Circuits that the presence of competing litigation subclasses does *not* categorically preclude the certification of a nationwide settlement class, absent proof of actual collusion between the settling plaintiffs and the defendants. Pet. 20-23 (discussing *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002), *Warfarin*, and *Rutter & Wilbanks*). Yet again, Chem-Tronics flatly ignores the circuit conflict. It

should be resolved.

II. THIS CASE IS IMPORTANT BECAUSE OF THE PRINCIPLES AT STAKE AND BECAUSE OF THE CONTEXT IN WHICH THEY ARISE

The petition demonstrated that, on top of the decisional conflicts it generates, the decision below implicates judicial administration and telecommunications policy concerns of the utmost importance. Chem-Tronics' responses again miss their marks.

1. In terms of the legal issues at stake, Chem-Tronics' response is bound up in its misunderstanding of the Seventh Circuit's decision as routine, fact-intensive, and non-doctrinal. That error is addressed above and need not be rehearsed here. Suffice it to say that the status of settlement class certifications in the wake of *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815(1999), is highly confused and much debated,[4] but nobody disputes that settlement class certifications *must* play a significant role in the fair and expeditious resolution of complex civil litigation – especially civil disputes nationwide in scope.

2. This case is an ideal vehicle for clarifying the role and status of settlement class certification procedures because it well illustrates exactly the type of circumstances in which the settlement class certification device *should* be employed: it is a major nationwide dispute, involving scores of different actions in dozens of states, with potential consequences for millions of Americans not directly party to the cases. Pet.

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[4] *See, e.g.*, Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 Vand. L. Rev. 1687, 1713-17 (2004); Richard A. Nagardeda, *Administering Adequacy in Class Representation*, 82 Tex. L. Rev. 287, 317-29 (2003); Elizabeth J. Cabraser, *Class Action Update 2002: Mass Tort Trends, Choice of Law Rule 23(f) Appeals, and Proposed Amendments To Rule 23*, Civil Practice and Civil Litigation Techniques in Federal and State Courts at 1200-02 (2002).

27. It cannot seriously be doubted that a conclusive, comprehensive, fair resolution of this dispute is to be preferred over the "expensive and lengthy chaos" continuing litigation of these claims will necessarily entail. Pet. App. 7a (Cudahy, J., dissenting).

Chem-Tronics offers only two responses. First, Chem-Tronics suggests – without evident irony – that this dispute is comparatively modest, involving only a "relative handful of state and federal class actions." Br. Opp. 1. But even if accurate, that characterization only *amplifies* the case for review: if 42 cases in 32 state and federal courts constitutes only a "relative handful" of actions, then the federal and state court systems must be swamped with a tide of litigation involving overlapping and duplicative class actions revolving around the same core disputes. And of course that is exactly what is happening. Pet. 26 & n.4. The parties and courts struggling under the weight of such a wasteful litigation process deserve clarification of the rules governing the comprehensive settlement of these disputes.

Second, Chem-Tronics denies that the many overlapping cases involved pose any concerns for users of the nation's telecommunications grid, as Judge Cudahy's dissent warns. Pet. App. 5a. It is "arrant nonsense," Chem-Tronics pronounces, to suggest that any of the actions seek the physical removal of the fiber-optic cables that give life to the grid. Br. Opp. 1. That claim is baffling: the removal of cables is *exactly* the remedy sought in many actions – *including at least two filed by Chem-Tronics' own counsel.*[5] Even more

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[5] *See, e.g.*, Second Am. Class Action Compl. at 14, *Smith v. Sprint Communication Co.* (N.D. Ill. filed Sept. 4, 2002) (No. 99c3844) (requesting that "Defendants be ordered to remove the fiber optic cable and related hardware from the railroad rights of way"); Compl. at 14, *Carrubba v. Worldcom, Inc.* (S.D. Miss. filed July 12, 2001) (No. 1:02cv282) (requesting "an injunction requiring Defendants to remove their fiber optic cables from Plaintiffs' land and to restore that land to its former condition"); Am. Class Action Compl. at 8, *Hord v. Qwest Com-*

important, Chem-Tronics simply ignores the distinct policy harms caused by the Seventh Circuit majority's decision to remit the parties to their litigation alternative. Litigation of these cases began more than 15 years ago and, in the absence of a comprehensive settlement, there is no end in sight. Instead of the fair and final resolution achieved by the settlement below, the future holds only a "nightmare of complexity," Pet. App. 5a (Cudahy, J., dissenting), which will be detrimental not only to the parties and courts involved in these actions, but to all citizens affected by the nation's telecommunications infrastructure. Especially given that infrastructure's "important value for the national economy as well as for national security," *id.*, there is no good reason to continue down this path, and every reason not to.

CONCLUSION

The petition for a writ of certiorari should be granted.

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munications Int'l, Inc. (Cir. Ct. Tenn. filed Mar. 24, 2005) (No. 40084) (requesting an order "ejecting the defendants from the property of the class members and requiring them to remove all their fiber optic conduit, cable and other equipment"); Class Action Compl. ¶ 39, *Kirkman v. Norfolk Southern Rwy Co.* (M.D.N.C. filed Aug. 7, 2001) (No. 01cv00850) (stating that the "Named Plaintiff and the Class members are entitled either to injunction for removal of the fiber optic cable or permanent monetary damages for the value of the easement taken by Defendants"); Compl. at 7, *Hallaba v. Wordcom Network Servs., Inc.* (N.D. Okla. filed Nov. 24, 1998) (No. 98-CV-895-H) (Chem-Tronics' counsel) (requesting that defendant be "preliminarily and permanently enjoined from trespassing upon the lands of the plaintiffs and members of the plaintiff Class to use and maintain their fiber optic cables"); Class Action Compl. at 12, *McDaniel v. Qwest Communications Corp.* (N.D. Ill. filed Feb. 18, 2005) (No. 05c1008) (Chem-Tronics' counsel) (same); First Am. Class Action Compl. at 18, *Nelson v. MCI Worldcom Network Servs., Inc.* (C.D. Cal. filed Nov. 26, 2001) (No. 01-08205) (requesting that the court issue an order "permanently enjoining defendants, and each of them, from operating and maintaining fiber optic cable on the Named Plaintiffs and Class member land without their consent").

Respectfully submitted,

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